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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

REMINGTON INVESTMENTS, INC.,
Petitioner,

v.

XEP NGUYEN aka XEP HUU NGUYEN aka BERNTHAL NGUYEN aka NGUYEN XEP HUU, individually and doing business as FRESH DONUT HOUSE, and QUY HUYNH NGUYEN aka GLORIA HUYNH NGUYEN, individually and doing business as FRESH DONUT HOUSE,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal for the State of California, Second Appellate District, Division Seven

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The FDIC took over a failed bank as receiver, and acquired with its assets a promissory note and security agreement executed by respondents herein. The FDIC then assigned the note, and the collateral represented by the security agreement, to petitioner.

Petitioner sued in California state court for recovery on the unpaid balance on the note, and thereafter petitioner filed a motion for summary judgment. Respondents did not dispute the amount of the unpaid balance, but argued that because the bank had allegedly failed to properly dispose of the collateral pursuant to California Commercial Code § 9504 ("§ 9504"), petitioner was barred from further recovery under the note.

There was nothing in the records of the failed bank regarding disposition of the collateral. Respondents' case was based on testimony of respondents and a former landlord as to what the bank officer allegedly said about taking and disposing of the collateral, and as to the one act of the bank officer requesting the landlord to give him access to respondents' former premises in order to view the collateral. Petitioner's case was based on the express wording of 12 U.S.C. § 1823(e)(1) barring testimony of the bank officer contradicting the records of the failed bank. The state courts agreed with respondents that 12 U.S.C. § 1823(e)(1) somehow did not cover the alleged words of the bank officer.

The questions presented are these:

1. May alleged oral statements of an officer of a failed bank be admitted to create a fact scenario whereby the value of an asset in the hands of the FDIC or its assignee is controlled by state commercial code law rather than 12 U.S.C. § 1823(e)(1)?

2. May oral statements of an officer of a failed bank be admitted to diminish or defeat the value of an asset

taken over by the FDIC, absent any other evidence of actual possession and abandonment under § 9504?

3. What events must be proven by admissible evidence before the alleged failure of a bank to have complied with § 9504 can be used to circumvent the provisions of 12 U.S.C. § 1823(e)(1) and thereby defeat the value of an asset acquired by the FDIC?

LIST OF PARTIES AND RULE 29.6 LIST

The parties in the state action, both at trial and on appeal, were Remington Investments, Inc., an Indiana corporation, petitioner herein, and Xep Nguyen, aka Xep Huu Nguyen aka Bernthal Nguyen aka Nguyen Xep Huu, individually and doing business as Fresh Donut House and Quy Huynh Nguyen aka Gloria Huynh Nguyen, individually and doing business as Fresh Donut House, respondents herein.

Remington Investments, Inc. has no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the court of appeal of the state of California, Second Appellate District, Division Seven, Case No. Civ. B 100281, is reprinted in the appendix hereto as Appendix "A". The California supreme court's denial of the request for review is reprinted in the appendix hereto as Appendix "B". The court of appeal has issued its remittitur sending the case back to the superior (trial) court. The notice of remittitur is reprinted in the appendix hereto as Appendix "C".

JURISDICTION

The denial of the request for review by the supreme court of the state of California was filed by that court on October 22, 1997. This petition is being filed within 90 days of that order. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1257(3).

PERTINENT STATUTORY PROVISIONS

The pertinent federal statutory provision in this case is 12 U.S.C. § 1823(e)(1), which is reprinted in the appendix hereto as Appendix "D". The pertinent state statutes, California Commercial Code § 9501(1) through (3) and § 9504(1) and (2), are reprinted in the appendix hereto collectively as Appendix "E".

STATEMENT OF THE CASE

A. Introduction.

On or about February 22, 1990, Independence Bank ("the bank") loaned the sum of $89,985.07 to respondents herein (hereinafter collectively "Nguyen") for commercial purposes, whereby Nguyen executed a promissory note (the "Note") in that amount due and payable on or before December 15, 1993. Said Note was secured by collateral in the form of food processing equipment. Subsequent to the execution of the Note, the bank was taken over by the Federal Deposit Insurance Corporation ("FDIC") as receiver. Thereafter, petitioner Remington Investments, Inc. ("Remington") purchased (and was assigned) the Note and the security agreement on the collateral from the FDIC, which executed an allonge on the Note evidencing said assignment.

Thereafter, Nguyen defaulted in payments on the Note, resulting in a balance due in the amount of $53,795.38. Nguyen has not disputed the unpaid balance on the Note. Although Remington claimed it was electing to seek collection of the amount due under the Note rather than

seek recovery from the collateral, Nguyen argued that Remington really was seeking a deficiency judgment. This in turn was based on Nguyen's allegation that sometime on or about October, 1991, the bank already had taken possession of the collateral and then abandoned it, thereby failing to comply with the requirements of California Commercial Code § 9504 (hereinafter "§ 9504"), and consequently causing the bank (and its successors in interest) to lose its right to a deficiency under the Note.

Nguyen's evidence of the alleged taking possession of, and abandoning of, the collateral consisted solely of the following: (1) the testimony of Nguyen that the bank officer, one Mr. Yokomizo, made an oral statement to the effect that he "agreed to take possession of the collateral, sell it, and use the proceeds to offset the remaining principal balance outstanding on the loan"; (2) an unsigned piece of paper with the bank logo on it containing only the printed words "written authorization to turn [sic] the equipment to Bank, and have us sell it"; (3) Nguyen's further testimony that the bank officer made the oral statement that "[he] told me to leave the equipment at the Shop and he would arrange to have it picked up, appraised and sold"; and (4) the testimony of one Kathleen Wedgewood, the property manager of Nguyen's landlord SAMKO, that the bank officer made the oral statement that:

> Mr. Yokomizo then informed me that he would contact me as to what the Bank intended to do with the collateral when he returned to his office. Mr. Yokomizo called me later that day and informed me that the Bank had just been seized by the FDIC, that he would not be able to get to his file anytime soon, and that we should now consider the equipment the property of SAMKO. I asked Mr. Yokomizo for a letter confirming this, but he refused.

Ms. Wedgewood also testified that she gave Mr. Yokomizo access to the premises to view the collateral. There

was no testimony that Mr. Yokomizo was ever given a key to the premises, that he ever physically took possession of the collateral, or that he ever moved the collateral. No one testified as to what actually ever became of the collateral.

B. Proceedings and disposition in the state courts.

On June 1, 1995, Remington filed suit against Nguyen in state court for the balance due on the Note. As the collateral seemed to have disappeared, Remington elected to seek recovery on the Note itself rather than look to any collateral. When discovery demonstrated no apparent defense to the debt, Remington filed a motion for summary judgment for the balance due. Nguyen filed a counter-motion for summary judgment, alleging that as the evidence of what the bank officer said was undisputed and therefore must be taken as fact, and as these facts established a case of improper abandonment of the collateral, the bank's failure to comply with the provisions of § 9504 created a defense against collection of any balance due on the obligation.

Remington had no way of locating the bank officer to see if he could or would contradict his alleged testimony. Regardless, Remington did not believe that this was required or even admissible under the express provisions of 12 U.S.C. § 1823(e)(1). In fact, even if Mr. Yokomizo's testimony had been available, and he was of a mood to testify on behalf of Nguyen as to an agreement on his part that would diminish or destroy the value of the asset, such testimony would not be admissiole under 12 U.S.C. § 1823(e)(1) to contradict the official bank record that showed the existence of the asset, including its collateral. That being the law, Remington argued that certainly a third party's testimony that Mr. Yokomizo had so agreed would be even less admissible under 12 U.S.C. § 1823(e)(1). Remington supported its argument with federal cases which clearly had gone beyond the original

fact situation of *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942), and which had uniformly precluded any type of alleged agreement by a bank officer not in the bank's official records, that could impair the collateral, including alleged accords and satisfaction, and substitution of other collateral.

Nguyen presented federal cases holding that once the bank took possession of the collateral, and then failed to properly dispose of it under § 9504, there was no longer merely an "agreement impairing the asset", but an improper *action* under state law which barred further recovery under the Note, thereby removing the case from the control of 12 U.S.C. § 1823(e)(1). Remington did not dispute the existence of this concept, but distinguished the concept by noting that such federal case law was not relevant to the case herein, as here there were no physical acts which resulted in the taking of possession, actual or constructive, by Mr. Yokomizo on behalf of the bank. Remington pointed out that Mr. Yokomizo's alleged *statements* of intent to take possession (and supposed abandonment to Ms. Wedgewood) were not present in the fact situations discussed in Nguyen's federal cases, and remained barred by federal law. Remington argued that Mr. Yokomizo's alleged statements, if taken together and admitted, certainly comprised an agreement that would affect the value of the asset by creating the very scenario desired by the debtor, namely that it would release the debtor from the entire balance of the obligation.

At the hearing on the summary judgment motions, the superior (trial) court agreed to accept Nguyen's and Wedgewood's testimony as to what Mr. Yokomizo allegedly said as evidence of possession and abandonment. The trial judge stated that Mr. Yokomizo's agreement to take possession of the collateral was not the type contemplated by federal law as being inadmissible to contradict the bank's records (even though it certainly did create a contradiction to what otherwise appeared to be

a valuable asset taken over by the FDIC, upon which Remington relied when purchasing the asset). As to the abandonment, the trial judge stated on the record, "it was like they sort of put it out on the parking lot, and said, 'Here, public, come and take this stuff' ". In the process of trying to justify a conclusion he apparently had reached already, the trial judge assumed two facts nowhere in evidence: First, that Mr. Yokomizo was even physically able to take possession (he had only been let into locked premises by Ms. Wedgewood to view the collateral, and had walked out without it), and, second, that he had moved it to another location.

The trial court subsequently corrected its fact conclusions by stating ". . . the bank just sort of said, 'Well, we don't know what to do with the . . . equipment, so we're just going to leave it here.' And that's really what happend, I think." In spite of this, the trial court affirmed possession and abandonment and gave summary judgment to Nguyen. In the process, it made three grievous errors. First, it finally admitted that the bank did not actually take possession, but only decided not to. The trial court still concluded, however, that an alleged agreement to take possession triggers the requirements of § 9504. Second, the trial court wrongly concluded that such an agreement was not intended to be barred by § 1823(e)(1). Finally, the trial court made its third error by stating that a certain California case, *Barber v. LeRoy*, 40 Cal. App. 3d 336 (1974), required that the creditor attempt to reduce the debt by taking and selling the collateral. *Barber v. LeRoy* does not stand for that proposition. The *Barber* court dealt with a case in which the bank *already had taken physical possession* of the property and thereafter failed to comply with proper sale requirements under § 9504, thereby losing the right to obtain a deficiency. *Barber v. LeRoy* never contradicted a creditor's clear right to the election of remedies provided by California Commercial Code § 9501. In fact all California case law on the subject is clear that the creditor does not have to

first seek recovery from the collateral before suing on the underlying debt.

In its appeal, Remington relied on the *D'Oench, Duhme* doctrine and related federal and California cases, and 12 U.S.C. § 1823(e)(1), to argue (a) that all the evidence of the alleged oral agreements of the bank officer in relation to the asset was inadmissible; (b) that the FDIC and its assignee, Remington, were entitled to rely solely on the written bank records; and (c) that the trial court was obligated to base its conclusions only on those records. Remington further argued that the whole purpose of *D'Oench, Duhme* and its statutory and case progeny was to avoid testimony by debtors (and even bank personnel) which the FDIC and its assignees would almost never be in a position to refute.

In response to Nguyen's § 9504 arguments, Remington argued that, even if the *D'Oench, Duhme* doctrine did not exist to bar the alleged oral agreement of the bank officer, that person's failure on behalf of the bank to actually take possession did not constitute an election coupled with a failure to properly notice and sell as required under § 9504. In fact, the bank officer elected to *not* take possession of the equipment. Therefore, the bank, or the FDIC, or its assignee, were still free to make an election to sue on the Note, rather than seek recourse from the collateral.

The court of appeal affirmed the decision of the trial court and in the process made even more unfounded fact conclusions as to what had transpired. That court stated that 12 U.S.C. § 1823(e)(1) did not apply because it dealt only with agreements, and then stated that "Mr. Yokomizo's advice to Nguyens that the bank would take and sell the collateral was not an 'agreement'. Rather it was an instruction directing Nguyens to comply with the requirements of a pre-existing agreement." (Pet. App. A, p. 6a). Later the court of appeal deviated from this approach by stating on the same page, "the interests

of Bank and FDIC were defeated, not by Yokomizo's advice to Nguyens of Bank's intent to repossess, but rather by his later careless *conduct* in giving away the collateral to SAMKO" [emphasis supplied]. (Pet. App. A, pp. 6a-7a.)

In other words, having first destroyed the clear evidentiary protection afforded to the FDIC and Remington by federal law, the court of appeal then dispensed with federal law as even being a deciding issue, and based its decision to affirm on what it termed "conduct", rather than agreements. However, other than Mr. Yokomizo's act of requesting that Ms. Wedgewood (the SAMKO property manager) let him onto the premises to view the equipment, the court of appeal could cite from the record no alleged "conduct" comprising a further course of *activity* by Mr. Yokomizo, and the court of appeal could only find from the record the further alleged *statements* to Ms. Wedgewood that because the FDIC had taken over the bank, he was not in a position to make a decision as to the collateral and that "she could have" the equipment.

In conclusion, the court of appeal found a way to make the statements of an officer of a failed bank into a § 9504 issue, with no regard for the specific requirements of federal law barring such statements.

REASONS FOR GRANTING THE WRIT

The whole purpose behind passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") was to allow the FDIC to accurately evaluate the assets of the bank, and in the case of failure, to maximize the return on those assets. The federal statute clearly pre-empts any application of state law which would give a debtor, particularly one who otherwise was clearly in default on the debt, an opportunity to testify as to a fact situation that would defeat the Congressional intent. This is particularly true where the FDIC or its assignees would be unable to produce the bank officer to

contradict the testimony of the debtor or his/her friendly witnesses.

The California court of appeal made every effort to avoid the fact that relying on the words allegedly spoken by Mr. Yokomizo places the case squarely under the controlling federal FDIC law, which bans the admissibility of such words to affect the value of an asset of a failed bank. The court of appeal offered no case law whatsoever to support its approach (or indeed any part of its opinion), but merely reaffirmed the trial court opinion that "this was not the type of agreement contemplated by *D'Oench, Duhme*".

The opinion of the court of appeal simply bounces back and forth between acts and words in order to avoid the clear intent and applicability of either federal law or state law regarding the required conduct, rather than mere words, necessary to trigger the applicability of § 9504. In the process, the court of appeal allowed these debtors to fashion a scenario which would permit the destruction of the value, upon which the FDIC and its assignees rely, of any bank asset secured by collateral. That is hardly what Congress intended with its enactment of FIRREA. Remington submits that this is just one more fact scenario that should be added to the long list of those ruled by federal (and even other California) courts as being precisely covered by *D'Oench, Duhme* and 12 U.S.C. § 1823(e)(1).

A review of the opinion (Appendix "A") of the California court of appeal shows what little regard it has for the intent and purpose of the controlling federal law.[1] It

[1] As this Court is aware, Remington recently has filed a petition with this Court for a writ of certiorari to another California court of appeal decision (Remington v. Hamedani), involving a different set of facts. However, the issue is similar in that the Hamedani court of appeal also ignored the supremacy of FDIC-related federal law by applying a state custodian of records evidentiary requirement. It appears that these two California courts of appeal do not understand when state evidentiary rules must give way to the relevant federal evidentiary rules in FDIC-related cases.

also shows how that court contorted its fact conclusions and assumptions in an attempt to avoid the application of 12 U.S.C. § 1823(e)(1) and to claim that the case should be considered instead as purely subject to state law under § 9504. It certainly opens a Pandora's box to a number of new creative fact situations in which debtors will be permitted to argue that "this is not an agreement covered by 12 U.S.C. § 1823(e)(1)."

In all of the federal cases that found a different set of facts beyond the pale of § 1823(e)(1), and therefore which permitted § 9504 to bar recovery by the FDIC or its assignees, the fact situations therein clearly showed that the bank *had* taken possession of the collateral, and then had either failed to give proper notice of sale to the debtor, or failed to conduct a commercially reasonable sale. Not one of these cases dealt with a situation where the bank officer said he would take possession and then changed his mind, nor where he allegedly said not only that the bank did not want to take possession, but that some third party could have the collateral.

The fact that some federal courts have found an exception to the prohibition contained in 12 U.S.C. § 1823(e)(1) as to anything not in the official bank records, may have caused some confusion as to how far that exception may be extended. Assuming that this Court approves of the lower federal courts' allowance of § 9504 exceptions as to what may be admitted to defeat the value of a bank asset in the hands of the FDIC, the state courts need instruction on the line that must be drawn between allegations of what a bank officer said or did, and solid physical evidence that the bank in fact did it. 12 U.S.C. § 1823(e)(1) must remain in control in the former situation, and § 9504 can only be allowed to replace 12 U.S.C. § 1823(e)(1) when it is clear that the latter situation took place. Remington respectfully submits that the writ should be granted so that Pandora's box can be closed without delay.

I. THE RELEVANT STATUTORY AND CASE LAW

A. The intent and purpose of 12 U.S.C. § 1823(e)(1).

In the seminal case of *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942), the FDIC acquired promissory notes from a failed bank which evidenced a borrower's indebtedness to the bank. The bank apparently also gave the maker of the notes a writing that memorialized an agreement that the notes would not have to be paid, but this writing was not in the bank records taken over by the FDIC. This Court held that the maker remained liable to the FDIC on the notes because a secret agreement which diminished what appeared to be bank assets on which regulators were entitled to rely, was contrary to federal banking policy. *Id.* at 459. The Court stated as follows:

> Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced.

Id. at 459.

Thereafter, Congress addressed this concern in an all-encompassing manner. Rather than limit the doctrine to any one set of circumstances (i.e. just to the facts of the *D'Oench, Duhme* case), Congress said the bank records could never be contradicted unless by other official documents in the bank file. The applicable statute is 12 U.S.C. § 1823(e)(1), which states:

> No agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance] Corporation in any asset acquired by it under this section . . ., either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement
>
> (A) is in writing,

> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously from the time of its execution, an official record of the depository institution.

This Code section makes it clear that Congress intended that the FDIC's collection rights are superior to the bank's, and that the FDIC should not be barred by defenses which would have barred the bank from recovery.

Congress did not expressly define the term "agreement". But it should be clear from the overall intent of the statute, as well as from cases decided by both federal and state courts, that 12 U.S.C. § 1823(e)(1) was not limiting the term to a formal contract, but rather to any expression by a bank officer not formalized in the bank records, which expression would affect the value of the asset.

In *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691 (5th Cir. 1991), the court stated:

> *D'Oench, Duhme* [citation] protects the FDIC and its assignees from unrecorded side agreements not reflected in the bank's records. . . . *It allows the FDIC to rely on the official bank records to the exclusion of any extraneous matters* [emphasis supplied], to set forth the rights and obligations of the bank and those to whom it lends money.

Griffin, 935 F.2d at 697.

Nowhere in the *Griffin* case did the court distinguish between unrecorded side agreements that affect the original loan contract, and unrecorded side agreements which

allegedly deal with the disposition of the security for the agreement, and therefore had a later impact on the loan obligation.

It certainly appears that the phrase "extraneous matters" covers the alleged expression of an intent to make an election of remedies under the commercial code, particularly where the debtor then goes on to testify that the remedy allegedly elected was not properly carried out. Such testimony, if permitted, defeats the value of the asset without the FDIC having any knowledge of such events from a review of the bank's official records.

In *Langley v. FDIC*, 484 U.S. 86 (1987), this Court explained that:

> [O]ne purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets, . . . [n]either . . . would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

Langley, 484 U.S. at 91-92.

Under the *Langley* rules, even if Mr. Yokomizo had written out and signed all the material upon which the California court of appeal relied as to his alleged oral statements to Nguyen or to Ms. Wedgewood, and such handwritten notations were part of the bank file obtained by the FDIC, these notes would be inadmissible to defeat the right to collect on the note. Such notes would not comprise the type of bank records clearly required by 12 U.S.C. § 1823(e)(1).

Of even greater importance, it is clear under the controlling federal statutory and case law that even if Mr. Yokomizo had wanted to testify in person for *Nguyen* that he had made all the statements attributed to him, such testimony would be inadmissible. Yet the trial court and the court of appeal herein admitted, and then relied on, the *debtor's* testimony as to what Mr. Yokomizo al-

legedly said. The California courts' complete avoidance of the provisions, intent and purpose of 12 U.S.C. § 1823(e)(1) is grievous error that requires correction by this Court.

There is a sound public policy basis for excluding all such alleged statements by a bank officer. A bank officer could have been fired or be upset by losing his job with a failed bank, and be willing to testify that he entered some agreement to defeat the bank, and its successor's, rights to collect on a loan. A disenchanted or dishonest bank officer may well hold a higher loyalty to a borrower who was a friend or *sub rosa* business associate.

12 U.S.C. § 1823(e)(1) has been applied at the behest of the FDIC and its assignees to defeat the claims and defenses of borrowers based on a wide variety of alleged agreements whose only flaw was their failure to meet the requirements of the statute. *See, e.g., E.J. Sebastion Assocs. v. RTC*, 43 F.3d 106 (4th Cir. 1994) [12 U.S.C. 1823(e)(1) & *D'Oench, Duhme* may be applicable to alleged oral contracts of the bank for services that do not involve lending of money]; *FDIC v. Betancourt*, 865 F. Supp. 1035 (S.D.N.Y. 1994) [an agreement is barred which states that surplus funds from a certain check would be applied against future loan obligations where the notes in the bank's records were not marked as cancelled]; *FDIC v. Karris*, 844 F. Supp. 1438 (D. Kan. 1994) [side agreement that the bank told the borrower that the notes would be paid by the sale of certain assets was barred because the alleged agreement was not contained in the official records of the lender]; *Cutler v. FDIC*, 796 F. Supp. 598 (D. Me. 1992) [high bidder at a foreclosure sale cannot assert changes in the bid not approved by the bank's loan committee prior to the FDIC takeover].

See also FDIC v. Bathgate, 27 F.3d 850 (3d Cir. 1994) [holding that a letter from the bank offering to consolidate debts could not be offered to prove accord and satisfaction]; *RTC v. Midwest Federal Savings of*

Minot, 4 F.3d 1490 (9th Cir. 1993) [all the requirements of the statute must be met; federal and state bank examiners are not bound to only partial compliance]; *FDIC v. Wright*, 942 F.2d 1089 (7th Cir. 1989), *cert. denied*, 504 U.S. 909 (1992) [holding that the *D'Oench, Duhme* doctrine applied even though the only fault on the part of the borrower was her failure to reduce the agreement to writing]; *FDIC v. Hoover-Morris Enter.*, 642 F.2d 785 (5th Cir. 1981) [barring an alleged agreement to take a deed as satisfaction of debt in lieu of the required payment]; *Black v. FDIC*, 640 F.2d 699 (5th Cir.), *cert. denied*, 545 U.S. 838 (1981) [barring an unwritten understanding to make new loans on certain real estate and disregard prior tardiness of the obligors on existing loans].

These cases did not limit the application of the exclusionary rule to any specific type of agreements. They clearly show that no words of any kind uttered by a bank officer will be admitted, which words were not formalized in the bank's official records as required by the statute and which have the effect of reducing or eliminating the value of a bank asset taken over by the FDIC. In *Federal Sav. & Loan Ins. Corp. v. Gemini Management*, 921 F.2d 241 (9th Cir. 1990), the court specifically referred to "abuses the *D'Oench* Court could not have imagined or predicted", and stated that now more than ever, the protective shield of the *D'Oench, Duhme* doctrine should be applied. *Gemini*, 921 F.2d at 245.

California courts have addressed the same issues with the same conclusions. In *Walsh v. New West Federal Sav. and Loan*, 234 Cal. App. 3d 1539, 1 Cal. Rptr. 2d 35 (1992), the debtors were in default and nearing foreclosure on land that secured a debt to the original lender, State Savings. The debtors alleged that they then entered a side agreement with an agent of State Savings for an exchange of security which was not reflected in the bank's records. The *Walsh* court affirmed the trial court's *exclusion* of debtors' attempt to offer evidence of such a side agreement. The *Walsh* Court stated that:

> The [*D'Oench, Duhme*] doctrine also seeks to ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure."

Walsh, 234 Cal. App. 3d at 1544.

The *Walsh* case is similar to the case on appeal herein, as Nguyens herein are arguing that they are not liable for a default situation because of an alleged side agreement with an agent of the bank to take possession of the security, and that the breach of his obligation to do so was a defense against the obligation.

There is no logical basis to distinguish between the applicability of *D'Oench, Duhme* to alleged side agreements (not in the banks records) to take possession of the security in the face of a default, and to alleged agreements to exchange the security in the face of a default as in the *Walsh* case. The *Walsh* court went on to state:

> A primary purpose of the doctrine 'is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets.' . . . Thus the doctrine encourages debtors to memorialize all agreements in writing and reflects the equitable principle that losses incurred as a result of unrecorded arrangements should not fall on deposit insurers, depositors, or creditors, but rather upon the person who could have best avoided the loss."

Id. at 1544 [quoting *Langley v. FDIC*, 484 U.S. 86, 91 (1987)].

Even though the *Walsh* facts are noticeably different from those in *D'Oench, Duhme*, and the Walshes were innocent of wrongdoing, the *Walsh* court went on to say:

> Nonetheless, mindful of the federal court's [sic] expansive interpretations of the doctrine and consistent with the authorities cited above, we conclude this case comes within the *D'Oench, Duhme* doctrine because (1) the Walshes are attempting to enforce an

> oral agreement [with Gallegos] . . . (2) which would reduce the value of assets formerly held by State Savings.

Walsh, 234 Cal. App. 3d at 1545.

The trial court and the court of appeal in the case herein tried to characterize the statements of Mr. Yokomizo as something other than an agreement, and therefore not covered by 12 U.S.C. § 1823(e)(1). However, the *Walsh* court stated that the bar to admissibility was not limited only to *agreements*, but could also be applied to "unrecorded *arrangements*", which is precisely on point here. Furthermore, the *Walsh* court stated:

> The doctrine has been expanded to encompass *any* claim against an insolvent institution that would either diminish the value of the assets held by the FSLIC or increase the liabilities of the insolvent institution (citing several federal opinions).

Walsh, 234 Cal. App. 3d at 1544.

The California court of appeal in the case herein simply ignored the very thorough analysis of federal law by the (California) *Walsh* court of the relevant issue, and made a mockery of the principals set forth therein. As a result, the contradictory opinion of the California court of appeal herein will simply encourage debtors in default to create new fact situations, not already expressly dealt with in existing California or federal case law, about what a bank officer said. It is obvious from all the cases cited above, that the clear intent of the federal statute was to exclude any such testimony, regardless of what allegedly was said by an officer of a failed bank, or what fact situation could then be further alleged from it. If the end result is to diminish the value of the asset taken over from the failed bank by the FDIC, the testimony is simply inadmissible.

It follows therefore that each and every one of the novel characterizations of Mr. Yokomizo's alleged statements which the California court of appeal has created in its opinion (i.e. the statements were "advise", an "in-

struction", "notice", a statement "giving away the collateral to SAMKO"), are nothing more than a repetitive disregard of the controlling federal law as set forth in 12 U.S.C. § 1823(e)(1) and the cases decided thereunder.

B. California Commercial Code § 9504 was incorrectly applied as an exception to 12 U.S.C. § 1823(e)(1).

§ 9504 sets forth the procedures for the repossession and sale of collateral if the creditor *chooses* to take the collateral and then still wishes to collect a deficiency. Nowhere does this section require that the collateral be taken in lieu of a judgment for money damages. The protections for the debtor in § 9504 are designed to keep the creditor from taking valuable collateral, selling it short, and then seeking an excessive deficiency. In fact, § 9504 begins with the words "A secured party after default *may* [emphasis supplied] sell, lease or otherwise dispose of any or all of the collateral". The secured party retains the option until it has clearly taken possession of the collateral. California Commercial Code § 9501 states, in subsection one thereof, "[t]he secured party may reduce his or her claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure."

In *Bank of California National Association v. Leone*, 37 Cal. App. 3d 444, 112 Cal. Rptr. 394, the *Leone* court, after quoting the above portion of § 9501, stated that this section permits:

> [a] creditor [to] elect to sue on a secured debt without resorting to the security. [citations omitted]. Since 1965, section 726 of the Code of Civil Procedure has not required foreclosure before suit on a debt secured on personal property; consequently a secured party need not exhaust his collateral to obtain a personal judgment. [citation omitted] Respondent was not required to repossess the vending machines before suing on the two notes which were covered by financing statements.

Leone, 37 Cal. App. 3d at 447.

In *Taylor v. Bouissiere*, 195 Cal. App. 3d 1197, 241 Cal. Rptr. 253 (1987), the *Taylor* Court stated that "if the security is personal property, the creditor's right to sue for personal liability on the debt is not restricted by any obligation to look first to the security." *Id.* at 1199.

In *Brunzell Const. Co., Inc. v. Smith,* 200 Cal. App. 3d 617 (1988), the court found that a number of acts related to seeking or asserting claims to possession did *not* constitute a reposession and thereby trigger the requirement of a § 9504 sale.

The case herein adds a unique additional fact. The testimony of Ms. Wedgewood, upon which the state courts placed such reliance, makes it clear that even if Mr. Yokomizo's original intent was to repossess the collateral, his mind was perforce changed for him by the FDIC takeover. Furthermore, she certainly could not rely on his alleged "gift" to her of the collateral, because he had just told her that because of the FDIC takeover, he no longer had the authority to make a decision. Furthermore, she admits that he refused to put the alleged oral statement as to the "gift" in writing. However, even if he had put it in writing *and it was in the bank's records*, it would *not* be admissible as the kind of official bank document required under 12 U.S.C. § 1823(e)(1) before it could be admitted to diminish the value of an asset in the hands of the FDIC.

None of the federal cases that did use § 9504 to preclude recovery dealt with mere expressions by a bank officer regarding an intention to repossess the collateral. All of these cases contained the fact scenario wherein possession *clearly had taken place* and then the bank failed to follow the procedural and notice requirements of § 9504. Once it is clear the bank has taken possession of the collateral to the extent that such possession should clearly be held to be an election of remedies, and the bank then fails to dispose properly of the collateral, the

federal courts have held that 12 U.S.C. § 1823(e)(1) no longer applies because, under those circumstances, agreements by bank officers to do something in relation to the asset are not the issue. Remington does not dispute this reasoning, but the latter fact situation is irrelevant to the case herein, which turns only on what Mr. Yokomizo said. Likewise, there are no California cases (prior to the one herein) where anything remotely similar to the alleged acts of Mr. Yokomizo comprised an irrevocable election. Yet the California court of appeal herein, with no authority whatsoever, found acts of possession (in order to avoid the pitfalls of calling it an agreement to possess) from the bank officer's "later careless conduct in giving away the collateral to SAMKA", a fact conclusion which relied only on what Mr. Yokomizo allegedly *said*. (Pet. App. A, p. 7a.)

There is only one piece of evidence as to Mr. Yokomizo's *conduct* (as distinguished from his communications) contained in Ms. Wedgewood's declaration. In this regard, she states only that Mr. Yokomizo came to her to view the collateral, and she gave him access to the shop to do so. This is not an act of possession. She said nothing about any other act whatsoever, or any act that could possibly support a finding that Mr. Yokomizo actually took possession. Nguyen's own testimony refers only to statements of the bank officer, and does not identify any acts whatsoever.

If ever a bank officer's statements are *in*admissible under 12 U.S.C. § 1823(e)(1), those offered by Nguyens in this case fit such a prohibition. Yet the California trial court and court of appeal (in the latter case by characterizing them as conduct rather than words) not only admitted these statements, they coupled them with the *solitary act* of going to view the collateral, so as to find that the bank officer had taken possession and thereafter abandoned the property.

SUMMARY

Nguyen has created a fact situation which Remington cannot refute, to wit that a bank officer made certain statements. Those statements allegedly created a scenario where the bank officer intended to take possession but did not, instead abandoning the property by allegedly stating that the landlord could have it. In dealing with this undisputed fact situation, the California courts simply applied the § 9504 rules as to loss of the right to recover on the Note when the creditor elects to retake the collateral and then fails to provide proper notice and conduct a proper sale.

The approach of the California court destroys in one fatal blow not only the ability of the FDIC to evaluate a failed bank's assets, but the acceptability of the packets of the bank assets which the FDIC is offering in the secondary market to investors such as Remington. The secondary market representatives inspect the packets and evaluate them the only way they can, by examination of the bank documents which the FDIC has produced therein. The bids for purchase of the packets must be submitted the next day, hardly enough time to investigate whether there exists some hidden defense to the value of the packet. This is precisely what Congress intended to regulate and limit. If the defense is not apparent in the packet, 12 U.S.C. § 1823(e)(1) forbids its introduction. Even if there is a copy of a letter in the packet from a bank officer stating that the bank intends to take possession of collateral, coupled with a copy of a letter to a landlord stating that the bank has changed its mind, these cannot be introduced by the debtor under the express prohibition of 12 U.S.C. § 1823(e)(1), because such letters would not be official bank records required before any such attack is permitted against the value of the asset set forth in the bank documents. Yet the California courts have said that nothing more than the testimony of the debtor and a property manager as to what a bank officer allegedly

said, can accomplish this very contradiction to the federal statute. The California state courts have opened the door to the virtual destruction of the Congressional intent.

The state courts have accomplished this by casually stating, without authority, that the statements of Mr. Yokomizo are not what is contemplated by 12 U.S.C. § 1823(e)(1). The state courts also made a mockery of § 9504 by equating those very statements of Mr. Yokomizo as being *acts* of physical possession and abandonment. In the process the California court of appeal has undermined and ignored the intent of those federal court decisions that found a true failure to comply with § 9504 as being beyond the agreement stage contemplated by § 1823(e)(1), and therefore a bar to recovery without violating the intent and purpose of FIRREA. The state courts must be informed that they cannot play fast and loose with the clear and controlling federal law. These courts also should be presented with a clear rule that, once and for all, bars *any* alleged statements of a bank officer which can then be used to create an as yet unlitigated scenario wherein such statements are then used to defeat the value of an FDIC asset acquired from a failed bank.

CONCLUSION

For all the foregoing reasons, Remington's petition for a writ of certiorari should be granted.

Respectfully submitted,

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